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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 437

COLORADO-UTE ELECTRIC ASSOCIATION, INC., a cooperative association, *Appellant*,

v.

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission, *Appellees*.

MOTION OF APPELLEES THE WESTERN COLORADO POWER COMPANY AND PUBLIC SERVICE COMPANY OF COLORADO TO DISMISS.

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MOTION OF APPELLEES THE WESTERN COLORADO POWER COMPANY AND PUBLIC SERVICE COMPANY OF COLORADO TO DISMISS.

Appellees, pursuant to Rule 16(b) of the Rules of this Court, move that the appeal be dismissed on the ground that it does not present a substantial federal question.

Question Presented

The questions as stated by appellant are not involved in this case. The only question that could possibly be raised —and it would be frivolous—is whether the State of Colorado may, consistent with the federal Constitution, impose upon electrical cooperatives the same requirements respecting authorization of a new generating facility as it imposes upon other public utilities.

Statement

Appellant, in an evident attempt to introduce into this case a substantial federal question, has radically misstated the facts. Fortunately, the opinion of the Colorado Supreme Court describes the relevant facts in detail, so that we need do no more than summarize them.

Appellant, a rural electric cooperative association, has provided for several years electric power on a wholesale basis to its member cooperatives, which in turn have distributed that power to the ultimate users (J.S. 108-109). Appellant furnished this power from existing generating sources (*ibid*).

In the application that led to this litigation, appellant sought from the Colorado Public Utilities Commission authority to build a new steam generating plant near Hayden, Colorado.[1] Appellant's purpose was, not to supply the needs of its original members, for which its existing sources were adequate, but rather to supply power to eight new members whom it had never served before (J.S. 109). These new members in the past secured their power from facilities of the United States Bureau of Reclamation, from their own generating plants, from municipal generating plants, and from other utilities (J.S. 109-110). Under the proposed plan of appellant, those sources would be supplanted by the Hayden facility (*ibid*).

Appellant's application was filed pursuant to the state statutory provision that in general requires any "public utility" to obtain from the Commission a certificate of pub-

[1] Appellant also sought approval of a financing commitment it had secured from the REA to build the plant (J.S. 105). Since the governing federal statute, 7 U.S.C. 904, explicitly provides that "no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained," no preemption contention has been, or could be, made.

lic convenience and necessity before constructing a facility to extend service into an area not theretofore served by the applicant and in which other utilities are providing service.[2] Utilities other than appellant were rendering service in the area which appellant proposed to serve, and appellant had not theretofore served that area (J.S. 107, 109, 110-111, 117, 149, 151). By an amendment enacted in 1961, prior to appellant's application of May 11, 1962, the Colorado legislature included in the definition of "public utility" every "cooperative electric association . . . whether supplying electric energy for the use of the public or for the use of its own members." 115-1-3(2), C.R.S. '63.[3] Thus

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[2] The statute, 115-5-1(1), C.R.S. '63, provides as follows:

"No public utility shall begin the construction of a new facility, plant, or system, or of any extension of its facility, plant, or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant, or system, and not theretofore served by a public utility, providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system shall interfere or be about to interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions or prescribing such terms and conditions for the location of the lines, plants, or systems, affected as to it may seem just and reasonable."

[3] This provision reads as follows:

"Every cooperative electric association, or non-profit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this chapter."

the statute on its face required Commission authorization for the proposed Hayden plant, as appellant conceded both by filing its application and also by explicit admission to the Commission (J.S. 152-153; see also J.S. 114).

Appellees, as public utilities long engaged in rendering service in the areas sought to be served by appellant, participated in the Commission proceeding and opposed the grant of a certificate to appellant.

By a 2-1 decision, the Commission awarded appellant the certificate. The Commission acknowledged that the needs of appellants' new members could continue to be met through existing sources (J.S. 67-68, 50-52, 110, 116-117), but the Commission interpreted the statute to permit the construction of substitute generating facilities even in these circumstances. The dissenting Commissioner agreed with the finding as to adequacy of existing sources but disagreed with the majority's reading of the statute (J.S. 94, 98).

In a brief opinion (J.S. 99-103), the State District Court affirmed the order of the Commission. The court also denied a stay, whereupon appellant commenced construction of the plant notwithstanding the pendency of the appeal to the Colorado Supreme Court. Appellant, however, assured both the Commission and the District Court that this course of action was perfectly riskless, since the Salt River Project Agricultural Improvement and Power District, an Arizona quasi-governmental unit that was one of appellant's new members, "had agreed to take the Hayden plant off the hands of Colorado-Ute at no loss to Ute in the event that 'some court' subsequently ruled that the certificate should not be issued" (J.S. 130, 106).

The Supreme Court, in a 6-1 decision, reversed the lower court and set aside the Commission's order. The Court explicitly accepted the Commission's findings of fact (J.S.

153-154, 110, 116-117), but it concluded that "no real effort was made [by the Commission] to decide this case in a manner consistent with the pertinent statute . . . and our many decisions construing and interpreting it" (J.S. 120).

More particularly, the Court rejected the Commission's view that the statute permitted the construction of a new generating plant to supplant pre-existing sources where those sources were adequate. Rather, the Court held that, under the Colorado statute, inadequacy of existing sources is a prerequisite to the construction of a new facility.

> "The State of Colorado has long been dedicated to the principle of 'regulated monopolies' in the conduct of public utility operations. This principle has been the public policy of this State since the year 1913 when the Public Utilities Act . . . was first adopted. The concept has never varied in a long line of decisions of this court.
>
> . . . . . .
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> ". . . [T]he regulated monopoly principle is not consistent with the theory of the case upon which the two concurring Commissioners based their decision.
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> . . . . . .
>
> ". . . This statute [115-5-1, C.R.S. '63] is the foundation of the regulated monopoly principle and as this court has observed on many occasions it was designed to prevent duplication of facilities and competition between utilities and to authorize new utilities in a field only when existing ones are found to be inadequate.
>
> . . . . . .

> "... Allowing customers to pick and choose from whom they will obtain any public utilities service obviously creates rather than prevents duplication, fosters rather than controls competition, and totally disregards the principle that inadequacy of existing facilities must be shown in order to authorize a new service" (J.S. 112-116).

Since, as the Court pointed out (J.S. 116-117), all members of the Commission had agreed that existing sources of power were adequate, it followed that the Commission had erred as a matter of law in awarding the certificate.

This should by all rights have been the end of the case, since the only issue throughout the proceedings had been whether the appellant was, as a matter of state public utilities law, entitled to a certificate. Appellant had never urged either that denial of the certificate would raise issues under the state or the federal Constitution, or that state law or the federal Constitution exempted appellant from the requirement that a certificate be obtained (J.S. 10, 122, 152).

The Supreme Court, however, asked for additional oral argument upon the question of the constitutionality of the 1961 statutory amendment by which cooperatives were required to comply with the Public Utilities Law (J.S. 10, 122).

In upholding the validity of the statute under the federal Constitution, the Court emphasized that prior to oral argument appellant "had not questioned the constitutionality of the Act, had filed its application before the Commission and followed the matter through Commission, district court, and briefs in this court without suggesting unconstitutionality" (J.S. 122). The Court also described the widely recognized interest of the consuming public in the activities of wholesale suppliers of electric power, as to which "[t]he form of organization delivering service makes no difference

whatever . . ." (J.S. 122-126). The Court concluded: "[Appellant] furnishes electric energy which is used by countless consumers in a very large segment of this State. The widespread interest of the public is clearly shown, and this Court should not declare the legislative act to be void, especially when the parties themselves admit that it is valid and enforceable" (J.S. 124).

On petition for rehearing, appellant raised the issues that it now presses upon this Court in its Jurisdictional Statement. The Supreme Court disposed of the contentions in such fashion as to leave no room for argument respecting their insubstantiality.

First, the Court flatly denied that its decision discriminated against appellant in any respect whatever. The Court had not "denie[d] Colorado-Ute the authority to serve its members and give[n] protestants the exclusive right to do so." Rather, the Court had simply applied to appellant the principle governing all other utilities, namely, that appellant "may not expand its facilities and spread its service areas to a point where it would encompass those already being adequately served by other certificated suppliers of electrical energy" (J.S. 149-150). Nor was it material that one major existing source was a non-regulated supplier, the Bureau of Reclamation, for "[t]he requirement of the Public Utilities Law is to protect the public from supporting increased investment (in this case in excess of thirty million dollars) without regard to whether that investment would duplicate the facilities of a regulated or a non-regulated supplier. The adverse economic impact upon the public is the same . . ." (J.S. 150). Moreover, appellant was not being denied the right afforded other utilities to construct new facilities to serve existing customers, because the " 'existing members' referred to in the petition for rehearing are the *proposed new members*

for whom it would be necessary that Colorado-Ute expand its service area to a large portion of the State of Colorado, and have additional electrical energy at its disposal. Colorado-Ute has not been denied the right to serve its original members. Its desire to construct *new facilities* and to serve *new members* was the very issue requiring proof of public convenience and necessity which it failed to sustain because of the Commission's conclusion that existing sources of energy were adequate" (J.S. 151).

Second, the Court dismissed appellant's argument that it could not constitutionally be regulated as a public utility. The Court referred to its previous discussion of the public stake in appellant's activities and also described how appellant had disclaimed any such contention earlier in the proceedings. "... Colorado-Ute completely reverses the position it unequivocally took before the Commission and throughout the entire proceeding, and apparently places reliance at this late date upon the content of the views of one dissenting Justice" (J.S. 152).

Finally, the Court agreed that, had it substituted its findings of fact for those of the Commission, "those adversely affected would have ground for complaint"; but it pointed out once again that the finding of fact assertedly made by the Court—that existing power sources were adequate—"was made by the Commission and is abundantly supported by the evidence" (J.S. 153-154).

These, then, are the facts against which the contentions made in the Jurisdictional Statement must be measured.

Argument

No substantial federal question is involved in this case. As we have indicated in the preceding statement, the Supreme Court of Colorado simply applied to appellant the principles of public utilities law that govern all regulated

producers of electric power in the State of Colorado. The contentions advanced in appellant's Jurisdictional Statement rest in large measure upon a misconstruction of the Colorado Supreme Court's decision, as that Court explicitly pointed out in dealing with those same contentions on appellant's petition for rehearing.

1. Appellant's first argument is that the State statute, as applied by the Colorado Supreme Court, is constitutionally infirm because it denies appellant "the same rights and opportunities as existing utilities." The first aspect of this contention is that the statute "denies Colorado-Ute the right to furnish power and energy to its members, and gives the Power Companies [appellees] the exclusive right and monopoly to furnish such service" (J.S. 15).

As to those areas in which appellees are now rendering service, it is certainly true that appellees will in the future be free to sell power to appellant's new members, as they did to a number of those members prior to the provision of power by the Bureau of Reclamation (J.S. 109-110).[4] It is also true that the members may well return to purchasing power from the Bureau.

But these considerations are quite immaterial to the constitutional issue, which is simply whether the "regulated monopoly" principle of the Colorado statute is wholly arbitrary or invidiously discriminatory. Plainly, it is neither. First, the generation and sale of electric power is an enterprise of such vital consequence to the public that

[4] Contrary to the assertion of appellant (J.S. 16)—which is unsupported by any record reference—appellees have adequate generating facilities to supply, in their respective service areas, all of appellant's new members, as the record clearly establishes (J.S. 110, 111, 117, 50, 67). While the opinion of the Colorado Supreme Court does not indicate how the state law would apply to a hypothetical situation in which appellees would seek to construct such facilities, surely it is clear that the requirements of that law would fall equally upon all utilities; and that, as we indicate above, is the constitutionally relevant point.

it is pre-eminently subject to state regulation.[5] Second, the provisions of the state law, as the Colorado Supreme Court stressed, apply equally to all public utilities. Thus, appellant as well as appellees has an advantage in established service areas; and appellees as well as appellant must, as a prerequisite to the construction of facilities to serve new customers in an area in which they have never provided service, demonstrate that existing sources of power are inadequate. And, finally, state regulation of public utilities grounded upon the conviction that the public will be best served by the elimination of duplication in generating and transmission facilities and by the full utilization of existing sources of power—the same conviction that underlies state regulation of many types of activities affecting the public—certainly cannot be termed arbitrary in light of this Court's many decisions affirming the broad scope of state police power. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *Olsen* v. *Nebraska*, 313 U.S. 236; *Nebbia* v. *New York*, 291 U.S. 502.[6] See also *Cities Service Co.* v. *Peerless Co.*, 340

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[5] See, *e.g.*, *Union Dry Goods Co.* v. *Georgia P.S. Corp.*, 248 U.S. 372; *Southern Iowa Electric Company* v. *Chariton*, 255 U.S. 539; *Laclede Gas Light Co.* v. *Murphy*, 170 U.S. 78; *New York* v. *Squire*, 145 U.S. 175; *United States* v *Oklahoma Gas & Electric Co*, 297 Fed. 575 (8th Cir. 1924).

[6] For examples of the application of the "regulated monopoly" principle in state regulation of business, see, *e.g.*, *General Alarm* v. *Underdown*, 76 Ariz. 235, 262 P. 2d 671, 672-73 (1953); *McFayden* v. *Pub. Util. Consol. Corp.*, 50 Idaho 651, 299 Pac. 671 (1931); *People ex rel. Hafer* v. *Flynn*, 14 Ill. App. 2d 301, 144 N.E. 2d 747, 756 (1957); *Missouri Pac. Ry. Co.* v. *State Corp. Comm.*, 192 Kan. 575, 389 P. 2d 813 (1964); *Eck Miller Transfer Co.* v. *Armes*, 269 S.W. 2d 287, 289 (1954); *State ex rel. Util. Comm.* v. *Carolina Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249 (1963); *Yellow Transit Co.* v. *State*, 198 Okla. 229, 178 P. 2d 83 (1947); *Yellow Cab Co. of Pittsburgh* v. *Pennsylvania Pub. Util. Comm.*, 161 Pa. Super. 41, 54 A. 2d 301 (1947); *Virginia Stage Lines* v. *Commonwealth*, 185 Va. 390, 38 S.E. 2d 576 (1946). Federal regulatory activities focusing on the standard of public convenience and necessity similarly stress the factor of adequacy of existing service. See, *e.g.*, Railroads—Transportation Act of 1920, 41

U.S. 179, 185-186, where this Court upheld the constitutionality of state regulation of natural gas prices on the ground that the aim of the regulation was to prevent economic and physical waste.

2. The second instance of "discriminatory treatment" cited by appellant (J.S. 17-18) is that in this case, but not in others, the Colorado Supreme Court rejected a Commission finding of fact, *i.e.*, the "finding" that the public convenience and necessity would be served by granting appellant's application. Of course, even were appellants' assertions correct, the most that would be disclosed would be an error by the state court, not the sort of "invidious discrimination" that amounts to a violation of the Constitution. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, *supra*, at 489. This Court has "said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck* v. *Washington*, 369 U.S. 541, 554-555. In addition, appellant's assertions are quite incorrect. As the Colorado Supreme Court repeatedly pointed out (see *supra*, pp. 4-5, 8), it accepted the Commission's findings of fact—in particular the finding

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Stat. 477, 478 (1920) as amended, 49 U.S.C. § 1(18), (20) (1958) as interpreted in *Chesapeake & Ohio Ry.* v. *United States*, 283 U.S. 35, 41-42 (1931); Motor Carriers—Motor Carrier Act of 1935, 49 Stat. 543 (1935) as amended 49 U.S.C. §§ 307(a), 309(b) as interpreted in *I.C.C.* v. *Parker*, 326 U.S. 60, 65-69 (1945); *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81, 88 (1961); *Curtis, Inc.* v. *United States*, 225 F. Supp. 894, 898 (D. Colo.), *aff'd*, 378 U.S. 128 (1964); Telegraph and Radio—Communications Act of 1934, 48 Stat. 1075, 1083 (1934), as amended, 47 U.S.C. §§ 214(a), 307(a) as interpreted in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215-17 (1943); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940); *Western Union Div. Commercial Telegraphers* v. *United States*, 87 F. Supp. 324, 335-36 (D.D.C.) *aff'd*, 338 U.S. 864 (1949).

that existing sources of power supply were adequate—and reversed the Commission solely because as a matter of law the statute in such circumstances precluded the authorization of a new facility. The "public convenience and necessity" standard is an ultimate conclusion that must be based upon the proper statutory criteria and upon adequate factual findings. See *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 64. Accordingly, the Colorado Supreme Court has repeatedly struck down orders where the Commission's conclusion respecting public convenience and necessity was not adequately supported. See, *e.g.*, *Public Utilities Commission* v. *Verl Harvey, Inc.*, 150 Colo. 159, 371 P.2d 452 (1962); *Public Utilities Commission* v. *Donahue*, 138 Colo. 492, 335 P.2d 285 (1959). Appellant's contention of discrimination is genuinely frivolous.

3. Appellant seems to suggest that somehow it has been unfairly treated by the Supreme Court's adverse decision after completion of the Hayden plant. But of course it assumed whatever risks there might be by proceeding with the construction. Moreover, evidently there was no risk, for appellant, as we have indicated, assured the Commission and Court that the Salt River Project, an Arizona entity, had agreed to save appellant harmless from the consequences of an adverse judicial decision.

4. Next, appellant contends that its constitutional rights have been violated by the Supreme Court's determination that it is a "public utility" within the meaning of the statute. This ruling, according to appellant, means that, although appellant does not hold itself out to serve the general public but rather only its members, it has now been saddled with the obligation to serve the public. This, says appellant, is constitutionally invalid." (J.S. 20).

We note that this is a rather curious argument for appellant to make, since, as the Colorado Supreme Court observed, "The record shows that

Whatever may be the permissible range of State regulatory authority in this respect—and we have little doubt that, despite the now discredited "freedom of contract" decisions relied upon by appellant, the authority would extend to requiring so vital an enterprise as a power producer to serve all members of the general public on equal terms—the issue raised by appellant most assuredly is not involved here.[8] All that the Colorado Supreme Court held, and all that its opinion can reasonably be read to mean even

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Colorado-Ute in wholesaling electric power intends to serve various classes of customers including consuming cooperatives, other wholesaling cooperatives, governmental or quasi-governmental bodies (Salt River), and even an arm of the Federal Government, the Bureau of Reclamation, together with any other applicants for service if approved by the Commission" (J.S. 123).

[8] The current vitality of the authorities cited by appellant may be gauged by the opinion of Judge Frank in *Fordham Bus Corporation* v. *United States*, 41 F. Supp. 712, 715 (S.D. N.Y. 1941):

> "A private carrier cannot, says the plaintiff [and the appellant here—J.S. 21], be converted, by legislative fiat, into a common carrier and thereby be subjected to regulations which are valid solely with respect thereto. In support of its contention, plaintiff [and appellant here—J.S. 21] cites such cases as Michigan Public Utilities Commission v. Duke, 266 U.S. 570, . . . and Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 . . .; cf. Smith v. Cahoon, 283 U.S. 553. But the basic postulate of those decisions was destroyed by the later decision in Nebbia v. New York, 291 U.S. 502, 536, 537 . . . which held that 'there is no closed class or category of . . . businesses affected with a public interest.' The court there said: 'And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.' See also Olsen v. Nebraska, 313 U.S. 236. . . . It is significant that the earlier cases cited by plaintiff were also cited in the dissenting opinion in the Nebbia case to show that the majority opinion was inconsistent with the prior precedents. See 291 U.S. at 555 . . ."

For another excellent description of how the decisions relied upon by appellant have been undermined, see *Boylan* v. *United States*, 310 F. 2d 493 (9th Cir. 1962), where the court rejected the contention that one whose business has never been "public in character" cannot constitutionally be required to secure a certificate of public convenience and necessity, such

in *dictum*, is that appellant is a "public utility" within the meaning of § 115-5-1(1) and therefore could not construct the Hayden plant without a certificate. If in subsequent litigation the question of the obligation of appellant to serve non-members were raised, presumably appellant would defend on the ground that no provision of the state statute specifically imposes such an obligation upon it, and further that section 115-1-3(2), in defining "public utility" as every cooperative or other supplier of electric energy "for the use of the public or for the use of its own members," indicates that cooperatives may restrict their service to members. Certainly such a contention would be available to appellant.

5. Appellant's final contention is as thoroughly insubstantial as those we have already discussed. Appellant entered into contracts with its new members to supply power from the Hayden plant; and so it now maintains that the Colorado Supreme Court decision, by disabling it from performing those contracts—all of which were made after enactment of the 1961 statutory amendment subjecting cooperatives to regulation (Tr. 80-83, Tr. Ex. 5, 6, 7, 30)—impairs the obligation of contract within the meaning of Article I, Section 10(1) of the Constitution. It is hard to believe that this contention is seriously advanced. Surely appellant must be aware of the line of decisions reaching from *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, to *El Paso* v. *Simmons*, 379 U.S. 497, establishing that contracts are made subject to the requirements of state law. Indeed, appellant need have looked no further than the very case upon which it relies for its contract clause claim, *Northern Pacific Railway* v. *Duluth*, 208 U.S. 583 (J.S. 3, 21). There the Northern Pacific contended that municipal legislation requiring it to repair a viaduct was an unconstitutional impairment of its prior contract with the City,

under which the City agreed to make such repairs at its own expense. In rejecting that contention, the Court held as follows:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts." *Id.*, at 596.

Conclusion

For the reasons set forth above, the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 437

COLORADO-UTE ELECTRIC ASSOCIATION, INC., a cooperative association, *Appellant*,

v.

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission, *Appellees*.

BRIEF

Of Appellant Colorado-Ute Electric Association, Inc., In Opposition To Motion of Appellees the Western Colorado Power Company and Public Service Company of Colorado to Dismiss.

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BRIEF

Of Appellant Colorado-Ute Electric Association, Inc., In Opposition To Motion of Appellees the Western Colorado Power Company and Public Service Company of Colorado to Dismiss.

Introductory Paragraph

Appellant Colorado-Ute Electric Association, Inc. will be referred to herein as Colorado-Ute; Appellees Western Colorado Power Company and Public Service Company of Colorado will be collectively referred to

herein as the Power Companies, or individually as Western or Public Service Company; and Appellee The Public Utilities Commission of the State of Colorado will be referred to herein as the Commission. References to the Jurisdictional Statement will be made as (J.S., p.); references to the Motion to Dismiss filed by Appellees will be made as (Motion, p.); and references to the Commission's Record will be made as (C.R., p.).

Appellant Colorado-Ute, pursuant to Rule 16(3) of the Rules of this Court, respectfully submits this Brief in opposition to the Motion to Dismiss heretofore filed by the Power Companies and asserts that said Motion should be denied since the appeal does present substantial federal constitutional questions, as is shown in the Jurisdictional Statement. We rely upon said Statement, since it deals with such issues in detail, to establish the substantial questions involved, rather than this Brief, which passes only upon some of the more glaring erroneous assertions made by the Power Companies in their Motion to Dismiss.

Questions Presented

The Power Companies assert (Motion, p. 1) that the questions stated in our Jurisdictional Statement are not involved in this case. We submit that the Jurisdictional Statement contains an adequate answer to this assertion. The Power Companies further assert (Motion, p. 1) that the only question that could possibly be raised is whether the State of Colorado may, consistent with the federal Constitution, impose upon electrical cooperatives the same requirements as it imposes upon other public utilities. While the Power Companies would like to phrase the questions involved

in such a way as to make the answers apparent, the question posed by them is obviously not the question involved. On the contrary, the first question posed in the Jurisdictional Statement is whether State law can make Colorado-Ute a public utility but deny to it the same rights and opportunities held by other public utilities, without violating rights of Colorado-Ute guaranteed by the United States Constitution. Furthermore, the question posed by the Power Companies wholly disregards the second question posed in the Jurisdictional Statement, namely, whether State law can make a public utility out of Colorado-Ute, which possesses none of the attributes of a public utility, without violating rights of Colorado-Ute guaranteed by the United States Constitution. Indeed, it appears to us that the Power Companies do not really contend that the Colorado law involved here *is* constitutional, but are content to rely merely on the assertion that there is not a substantial federal question involved. As shown above, there are not only federal questions involved, but serious federal constitutional questions involved. Such being the case, the appeal should not be dismissed.

Statement

In their opening remarks the Power Companies assert (Motion, p. 2) that Colorado-Ute has radically misstated the facts. They fail, however, to show a single fact misstated by Colorado-Ute, relying instead on their assertion of only those facts which they deem important.

The Power Companies also attempt to cast doubt on the need for the Hayden Plant (Motion, pp. 2 et seq.), and this despite the express findings of the Com-

mission that Colorado-Ute is "faced with the immediate problem of securing new and additional sources of power and energy" (J.S., p. 50), that such "problem . . . is not substantially questioned in the record" (J.S., p. 50), and that "the entire record basically supports the finding that Ute needs more power" (J.S., p. 67).

The Power Companies also assert (Motion, p. 3) that utilities other than Colorado-Ute were rendering service in the area which Colorado-Ute proposed to serve. The Commission in its decision adequately answered this assertion as follows:

> "If power from the Hayden Plant were to be used to invade the certified area of private utilities, the position of Protestants (the Power Companies) that they would be detrimentally affected would be sound. This, however, is not the case. *Power from the Hayden Plant will be used to serve consumers who are not now customers of private utilities.*" (Emphasis added, J.S., p. 66).

The above statement by the Commission clearly indicates that no public utility (and particularly neither of the Power Companies) is presently serving the so-called "new members" of Colorado-Ute. It also clearly indicates a distinction which the Power Companies fail to make, namely, that Colorado-Ute did *not* seek, and did *not* receive, any authority from the Commission whatever to serve any *area*. It sought the right to serve its members *only* (J.S., p. 28), and the Commission carefully restricted Colorado-Ute to serving its members *only* (J.S., p. 59). All of the Colorado members of Colorado-Ute are themselves public utilities subject to regulation by the Commission, and the

public is served through these members, and not through Colorado-Ute.

The strange position of the Power Companies in this matter was pointed out in the Judgment of the Montrose District Court, wherein Judge Kempf pointed out that the Power Companies:

> "... are aptly described as 'investigators and informants' for the Commission. Neither of them is selling power to any of the members and consumers of the fourteen distribution cooperatives ...". (J.S., p. 100).

In view of the foregoing it is surprising that the Power Companies would point out (Motion, p. 5) that the statute (1963 C.R.S. 115-5-1), in the words of the Colorado Supreme Court, "was designed to prevent duplication of facilities and competition *between utilities*". This is particularly surprising in view of the fact that the members of Colorado-Ute were being served only by Colorado-Ute and the Bureau (the latter not being considered a public utility even by the Colorado Supreme Court, J.S., p. 151), and were not being served by either of the Power Companies. Further, the Bureau *supported* the application of Colorado-Ute, thereby indicating that it did not consider the construction of the Hayden Plant as duplicative of Bureau facilities or a competitive threat to it.

The Power Companies also point (Motion, p. 6) to the language of the Colorado Supreme Court that customers cannot be allowed "to pick and choose from whom they will obtain any *public utilities* service." (Emphasis added). Again, the absurdity of the statement is apparent since none of the members of Colorado-Ute was receiving such service, or proposed to